DIRECTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down

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V. CONCLUSION: IN A GALAXY NOT TOO FAR AWAY?

I. INTRODUCTION

The Federal Arbitration Act (FAA) is the primary federal statute governing millions of arbitration agreements that have mushroomed in every nook and cranny of modern American society.[1] It is no secret, and a tremendous embarrassment, that the Supreme Court of the United States has grossly erred when construing and applying the FAA in a long series of cases spanning the last few decades, and these flawed decisions have encouraged this explosion of arbitration agreements across America. As admitted by some Justices, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[2] Through these flawed decisions, the Court has shifted the foundations of the entire civil legal system and barricaded the courthouse doors, at both the federal and state levels, in a way never intended by Congress.

In its most recent FAA decision from December 2015, *DIRECTV, Inc. v. Imburgia*,[3] the Supreme Court continued its awkward tradition of issuing preposterous FAA rulings. The Court's *DIRECTV* decision is defective on many levels. For example, although the FAA was never intended to apply in state courts,[4] the Court in *DIRECTV* applied the FAA to a state court proceeding.[5] Furthermore, although the FAA was designed to facilitate the arbitration of contractual claims and never intended to cover the arbitration of statutory claims,[6] the Court in *DIRECTV* used the FAA to compel arbitration

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[1] Arbitration, General Provisions, 9 U.S.C. §§ 1–16 (2016); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1.

[2] Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring); *id.* at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [the Court's flawed FAA ruling in Southland, Inc. v. Keating, 465 U.S. 1 (1984)], since Southland will not become more correct over time..."). *See also* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 478 (2015) (Ginsburg, J., dissenting, joined by Sotomayor, J.).

[3] *DIRECTV*, 136 S. Ct. at 467–71.

[4] IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 122–23 (1992).

[5] *DIRECTV*, 136 S. Ct. at 466 ("We here consider a California court's refusal to enforce an arbitration provision in a contract. In our view, that decision does not rest 'upon such grounds as exist...for the revocation of any contract,' and we consequently set that judgment aside.").

[6] *Compare* 9 U.S.C. § 2 (declaring that written provisions in a contract "to settle by arbitration a controversy thereafter *arising out of such contract*" are fully enforceable)

of critical statutory claims designed to protect consumers.[7] The Court has increasingly painted itself into a smaller and smaller corner each time it issues a new, flawed FAA decision building upon the shaky foundation of the its prior glaring errors in this field. However, the Court in *DIRECTV* reached a new low, a result so extreme and "dangerous," according to the dissenting Justices,[8] that the Court's *DIRECTV* decision turns arbitration law completely upside down.

This Article explores the Supreme Court's tortured and strained interpretation of the FAA in its recent *DIRECTV* decision. As demonstrated below, the Court's flawed decision uses a "Jedi Mind Trick" to turn arbitration law upside down.[9] The Court's decision desecrates the most fundamental principle of arbitration law, that arbitration must be based on the agreement of the parties.[10] The Court overrides and alters the intent of the parties in this case, as well as the intent of Congress in enacting the FAA.

The first part of this Article explains the background of the *DIRECTV* case and summarizes the Court's ruling. The second part of the Article closely examines the deep, multiple flaws in the *DIRECTV* opinion. Finally, the Article concludes by addressing how *DIRECTV*'s holding applies to some common hypotheticals in order to demonstrate the broader impact of this case in shutting off access to America's civil justice system.

(emphasis added), *with* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (expanding the FAA to cover statutory claims, but omitting the critical qualifying phrase "arising out of such contract" from the Court's quotation of 9 U.S.C. § 2).

[7] *DIRECTV*, 136 S. Ct. at 471 (underlying claims involved California consumer protection legislation).

[8] *Id.* at 473 (Ginsburg, J., dissenting, joined by Sotomayor, J.).

[9] STAR WARS: EPISODE IV – A NEW HOPE (20th Century Fox 1977) (where Obi-Wan Kenobi overrides the minds of imperial stormtroopers by making them believe that the droids in Obi-Wan's possession "aren't the droids [the stormtroopers are] looking for" by using a Jedi Mind Trick); STAR WARS: EPISODE VI – RETURN OF THE JEDI (20th Century Fox 1983) (describing Luke Skywalker's power to manipulate others, Jabba the Hutt first used the phrase "Jedi Mind Trick" in the third installment of the Star Wars movie although a Jedi Mind Trick first occurred in the original Star Wars movie). The Court's reasoning in *DIRECTV* can be compared to a Jedi Mind Trick because the Court overrides and alters the intent of the parties in this case as well as the intent of Congress in enacting the FAA.

[10] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement...") (citations and internal quotations omitted); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties.") (citations omitted).

II. A LONG TIME AGO, IN A GALAXY FAR, FAR AWAY . . . (BEFORE THE COURT'S DECISION IN *AT&T MOBILITY LLC V. CONCEPCION*[11])

Before critiquing the Supreme Court's decision, this section of the Article provides some background. Below is an overview of some facts and issues of the *DIRECTV* case, as well as a summary of the trial court's, appellate court's, and Supreme Court's decisions.

DIRECTV is a broadcast satellite service provider of television entertainment in the United States, with more than twenty million customers.[12] Based on DIRECTV's marketing practices, the Federal Trade Commission charged DIRECTV in 2015 with false and misleading advertisements.[13] DIRECTV service agreements typically require a mandatory two-year obligation, subject to certain early termination fees.[14] However, instead of focusing on this two-year obligation, many DIRECT advertisements feature a low, "teaser" monthly rate, which is in effect just for the first twelve months of the contract.[15] These low "teaser" rates result in a discounted first year for the contract, and prices for customers significantly increase by sometimes as much as 50 to 70% for the second year of the contract.[16] Also, if a customer cancels the service before the two-year contract expires, DIRECTV charges the customer cancellation fees of up to $480.[17]

DIRECTV's failure in its ads to clearly and prominently disclose the two-year contractual obligation, the price jump in the second year, and the substantial cancellation fees form the basis for the Federal Trade Commission's government action against the company.[18] These practices of DIRECTV also form the basis for the private plaintiffs' class action lawsuits filed against the company, which led to the Supreme Court's decision.[19]

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[11] 563 U.S. 333 (2011).

[12] UNITED STATES SECURITIES EXCHANGE COMMISSION, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT 2 (2014).

[13] Complaint at 8–9, Federal Trade Commission v. DIRECTV, No. 3:15-cv-01129 (N.D. Cal. Mar. 11, 2015).

[14] *Id.* at 3.

[15] *Id.* at 4.

[16] *Id.*

[17] *Id.* at 3.

[18] *See generally id.*

[19] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015).

In 2007, DIRECTV's service agreement sent to its customers contained a binding arbitration clause.[20] This arbitration clause, like many arbitration clauses of today, contained a class action waiver stating that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration."[21] DIRECTV's contract also contained an anti-severability or "blow-up" clause stating that if the "law of your state" makes the class action waiver unenforceable, then the entire arbitration agreement is unenforceable.[22] At the time the 2007 contract was entered into, some courts were invalidating class action waivers pursuant to state law.[23] The "law of your state" blowup clause helped ensure that if a court invalidated DIRECTV's class action waiver, the case would proceed in court instead of as a class arbitration.[24]

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[20] *Id.* at 466.

[21] *Id. See also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 10, 46 (2015) (The Bureau, in its landmark report to Congress regarding the use of arbitration in connection with financial services and products sold to consumers, found that "[n]early all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis." Just like DIRECTV's arbitration clause at issue in this case, most of the clauses studied by the Bureau contained an anti-severability clause providing that if the class action waiver is held unenforceable, then the entire arbitration clause is also unenforceable.).

[22] *DIRECTV*, 136 S. Ct. at 466.

[23] Discover Bank v. Superior Court, 113 P.3d 1100 (2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[24] Another benefit for DIRECTV in drafting a contract providing for state law to govern is that a state-by-state analysis can be used to frustrate the certification of a nationwide class. It is important to recognize this is a nationwide contract and not used solely in California; the effect of DIRECTV's terms is to incorporate the laws of each of the fifty different states, depending on where a customer is located. Imagine a hypothetical situation where DIRECTV's agreement did not contain a blowup clause, and suppose that a customer files a nationwide class action in court on behalf of customers in every state. Without DIRECTV's blowup clause and its direction to engage in a state-by-state analysis of the enforceability of the class waiver, there is a risk that a court in one state may apply its own state's laws to invalidate the class waivers for an entire nationwide class of DIRECTV's customers. For example, if a nationwide class action is filed in California, a California court may apply California law and invalidate the class waivers for the entire nationwide class, *for every customer in every state*. After such a sweeping invalidation of the class waivers for an entire nationwide class based on the laws of only one state, perhaps class proceedings could potentially occur consisting of a nationwide class of all DIRECTV customers. By including the blowup clause requiring an individualized, state-by-state analysis of the enforceability of the class waiver provision, DIRECTV ensures that if a customer files a nationwide class action in court, a court would not sweepingly invalidate the class waiver for the entire nationwide class based on the laws of just one state. As a result of the blowup clause with its state-by-state analysis, arbitration will generally be

In 2008, DIRECTV's customers filed class action proceedings in state court alleging that DIRECTV had violated California laws through its early termination fees.[25] At the time the litigation began, the Supreme Court had not issued its landmark decision in *AT&T Mobility LLC v. Concepcion*, which preempted a state law which in effect invalidated class action waivers and imposed class procedures on an arbitration proceeding.[26] DIRECTV, believing the class action waiver would not be enforceable under California law and the arbitration clause would thus not be enforceable through the blowup clause, did not ask the trial court to enforce the arbitration clause at first.[27] However, three years into the litigation, after the Supreme Court issued its *Concepcion* decision in 2011, DIRECTV asked the trial court to enforce the arbitration agreements and order the plaintiffs to pursue their claims individually in arbitration.[28]

Taking a look at the bigger picture and beyond the special issues of arbitration law in this case, what is really at stake with this fight that went all the way to the Supreme Court is whether the claims will proceed individually in arbitration, or instead in court, where the possibility of a class action exists.

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compelled on an individual basis in states whose laws permit class waivers. But if a court finds that a class waiver is not allowed under a particular state's laws, the blowup clause providing for a state-by-state analysis would invalidate the arbitration clause just in that one state, and most importantly not for the entire country, and the case could perhaps proceed as a statewide class, but not automatically as a nationwide class. By incorporating a state-by-state analysis in its contract, DIRECTV helps ensure that at most, there are small, state-by-state explosions or invalidations of the class waiver, instead of a large-scale invalidation of the class waiver for the entire country. By incorporating the "law of [each customer's] state" in the blowup clause, DIRECTV made a calculated choice to provide for a state-by-state analysis of its class waiver, which in turn helps thwart the possibility of certification of an expansive nationwide class. *See, e.g.*, Hill v. T-Mobile USA, Inc., 2011 WL 10958888, at *18 (N.D. Ala. May 16, 2011) ("Plaintiffs have also failed to factor in the varying impact that class action waivers, agreements to arbitrate, and challenges to such provisions' contractual enforceability *as a matter of state law* will have on the predominance inquiry (in connection with a purported nationwide class).") (emphasis added); Cohen v. DirecTV, Inc., 2007 WL 5314555 (Cal. Super. Ct. Nov. 15, 2007) ("Where a *state by state analysis* of an arbitration provision's enforceability would be required to certify a nationwide class, predominance does not exist and the nationwide class should not be certified.") (emphasis added and citation omitted), *aff'd*, 101 Cal. Rep. 3d 37 (Cal. Ct. App. 2009).

[25] *DIRECTV*, 136 S. Ct. at 466.

[26] *Concepcion*, 563 U.S. 333.

[27] Brief for Petitioner at 7–8, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (No. 14-462), 2015 WL 3505225 (May 29, 2015).

[28] Imburgia v. DIRECTV, Inc., No. BC398295, 2012 WL 7657788 (Cal. Super. Feb. 26, 2012).

This case is part of a larger battle and debate in American society about the role of class actions in our legal system, with large corporate interests who desire to end class actions pitted against consumer and employee rights groups who tend to favor the availability of class mechanisms.[29]

A. *Episode I: Trial Court's Order Denying Arbitration*

In a brief decision with minimal analysis, the trial court refused to enforce DIRECTV's arbitration clause.[30] The trial court acknowledged that the Supreme Court's *Concepcion* decision had invalidated California's *Discover Bank* rule, which was a judge-made rule that generally invalidated class action waivers in consumer contracts.[31] However, the trial court reasoned that the *Concepcion* decision was distinguishable and did not address FAA preemption of a state statute prohibiting waivers of statutory representative actions.[32] The trial court found that California's Consumers Legal Remedies Act (CLRA), which was the basis for some of the plaintiffs' claims, does not permit the waiver of the right to bring a collective action.[33] The trial court compared CLRA claims to claims under California's Private Attorney General Act, and the court recognized that both types of claims authorize public injunctive relief for the benefit of the general public, not just the individual plaintiff.[34] The trial court believed such claims could be subject to arbitration under the FAA.[35]

B. *Episode II: Appellate Court's Decision Denying Arbitration and Concluding "State Law" Really Means "State Law"*

The appellate court affirmed the trial court's refusal to enforce the arbitration clause. Citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[36] the appellate court understood that parties can agree for state law to govern an arbitration clause, and the appellate court then turned to the issue of whether the parties here had agreed to adopt

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[29] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1.

[30] Trial Order, Imburgia v. DIRECTV, Inc., 136 S. Ct. 463 (2015) (No. 14-463).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Volt Info. Sci., Inc., v. Bd. of Tr. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989).

state law.[37] Focusing on the phrase "law of your state," the appellate court reasoned this phrase could have two possible meanings: 1) California law, without considering the preemptive effect, if any, of the FAA; or 2) California law, taking into account the preemptive effect of the FAA.[38] To resolve this problem of interpretation, the court relied on several general principles of contract interpretation under state law. First, the appellate court reasoned that specific contract provisions trump more general contract provisions when the terms are inconsistent.[39] Applying this reasoning, the appellate court found the specific reference to "state law" governing the enforceability of the class action waiver trumped the more general reference in the contract that the FAA governed the arbitration clause.[40] Also, the appellate court relied on the general contract interpretation principle that ambiguities are resolved against the drafter.[41] The appellate court also recognized that DIRECTV in other parts of its arbitration agreement had similarly incorporated state law with respect to the issue of judicial review of arbitral awards.[42] The appellate court found that the phrase "law of your state" was intended by the parties to mean California law, without considering the preemptive effect of the FAA.[43] As a result, because the class action waiver was not enforceable under California law, the appellate court held that DIRECTV's blowup clause invalidated the entirety of the arbitration agreement.[44]

C. *Episode III: Reversal by the Supreme Court of the United States*

The Supreme Court, in a 6–2–1 vote, reversed the appellate court's decision and remanded for further proceedings. Justice Breyer wrote the majority opinion, finding that the FAA preempts the appellate court's interpretation of the contract.[45] Before engaging in an analysis of the legal issues, the majority issued an unusual, stern warning. Justice Breyer's majority opinion declared that *Concepcion*—a decision where Justice Breyer was among the dissenters when it was issued in 2011—is the law of the land, and pursuant to the Supremacy Clause of the Constitution, judges of every

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[37] Imburgia v. DIRECTV, Inc., 225 Cal. App. 4th 338, 342–43 (Cal. Ct. App. 2014).
[38] *Id.* at 343–44.
[39] *Id.* at 344.
[40] *Id.*
[41] *Id.* at 345.
[42] *Id.* at 344 n.2.
[43] *Id.* at 344.
[44] *Id.* at 347.
[45] *DIRECTV*, 136 S. Ct. at 465–71.

state must follow it, even if they believe the decision is wrong.[46] To help set the stage for his analysis, the majority then agreed with the appellate decision below that the FAA gives parties "considerable latitude" to elect state law to govern some or all of its arbitration agreement, and in theory, parties can agree to have portions of their contract governed by "the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule and irrespective of that rule's invalidation in *Concepcion*."[47] The majority then recognized that the appellate court had interpreted "law of your state" to mean California law, irrespective of the FAA's preemptive powers, and the majority cited *Volt* and acknowledged that state court interpretations of a contract's terms pursuant state contract law are owed deference.[48] As a result, the majority explained that the issue in this case is not whether the appellate court's interpretation is correct, but whether the appellate court's interpretation is consistent with the FAA.[49] The majority acknowledged that the state court was the "ultimate authority" on interpreting a contract under state law,[50] but nevertheless, the majority concluded that "the Court of Appeal's interpretation is pre-empted by the Federal Arbitration Act."[51]

Justice Ginsburg, joined by Justice Sotomayor, wrote a strong dissenting opinion. The dissent believed the appellate court correctly applied traditional contract law principles, including the principle that ambiguities are resolved against a drafter, to properly interpret the arbitration clause as referring exclusively to state law, without the preemptive effect of the FAA.[52]
Justice Thomas wrote a separate dissenting opinion based on his long-held belief that the FAA does not apply to state court proceedings.[53]

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[46] *Id.* at 468.

[47] AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 468 (2011).

[48] *Id.*

[49] *Id.*

[50] *Id.* ("Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law.").

[51] *Id.* at 471.

[52] *Id.* at 471–78.

[53] *Id.* at 471.

III. THE SUPREME COURT'S JEDI MIND TRICK THAT TURNS ARBITRATION LAW UPSIDE DOWN

A. *California: The Wild, Wild West or Tatooine*[54] *of Arbitration Law*

To provide a broader context for this case, it is helpful to examine some of the statements made by the majority Justices during oral argument of this *DIRECTV* case. Based on oral argument, it is clear the Justices mistrust the California courts on arbitration issues. It appears that the majority of Justices think of California as the lawless wild west of arbitration law.

During oral argument Justice Breyer asked a hypothetical question which was revealing about his views of this case. During oral argument, he inquired what would happen if a contract clearly stated "do not turn on the light," but a state court disingenuously interpreted this language to mean "turn on all the lights."[55] It appears the majority thought that the language in the contract was so clear that the California appellate court in effect was disingenuously interpreting the word "up" to mean "down."

Based on his questions during oral argument, Justice Breyer appears to have conceptualized the lower court's decision as displaying hostility and discrimination against arbitration through thinly-veiled, superficial arguments purportedly based on general contract principles. The majority's belief that the lower court engaged in disguised hostility helps explain the unusual and stern judicial smackdown at the beginning of the majority's analysis, where the majority warns that lower courts must follow the Supreme Court's lead, even if they believe the Supreme Court is wrong.[56]

Based on oral argument, it seems apparent that the majority wanted to reverse the appellate court's decision. Why? The majority appeared to believe that the appellate court's interpretation was wrong and disingenuous. However, this belief cannot justify a reversal. It would not be appropriate for

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[54] Tatooine is the desolate, remote, desert planet where Luke Skywalker lived in the first Star Wars movie. STAR WARS: EPISODE IV – A NEW HOPE (20th Century Fox 1977).

[55] Oral Argument at 4, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (No. 14–462). During oral argument, it appears Justice Breyer was trying to suggest that the California courts, which were using neutral, state contract law principles to discriminate against arbitration agreements, were behaving like the Southern states during the civil rights movement, when Southern states convicted African-American demonstrators who were engaging in sit-ins at lunch counters. Oral Argument at 18. Although these state convictions appeared at first glance to be facially neutral and based on state laws like trespass or breach of peace, it was obvious the state convictions were racially motivated. *See, e.g.*, Peterson v. City of Greenville, 373 U.S. 244 (1963).

[56] *DIRECTV*, 136 S. Ct. at 468.

the Justices to strike down the appellate court's decision on the grounds that the state court's interpretation was incorrect under state law.[57] Justice Breyer admitted during oral argument that the Supreme Court does not have that power to say the appellate court's interpretation was wrong.[58] As the majority recognized in its decision, state courts are the "ultimate authority" on interpreting contracts under state law.[59] The Justices in the majority were very careful to stress that they were treating the state court's interpretation as correct under state law:

> [W]e must decide not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.... Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law.[60]

The majority Justices appeared to believe the appellate court's decision was simply wrong, but they had to respect the state court's interpretation as correct and authoritative under state law. What justification did the Justices concoct to trump the state court's authoritative interpretation under state law? The Justices relied on FAA preemption: "[T]he Court of Appeal's interpretation is pre-empted by the Federal Arbitration Act."[61] But as explained below, preemption in this context turns arbitration law upside-down.

B. *The FAA Strikes Back: How the Supreme Court Expanded FAA Preemption in* DIRECTV *and Violated the Most Fundamental Principle of Arbitration Law*

Since the 1980s, the Supreme Court has assisted corporate America with docket-clearing by bestowing the FAA with some very impressive intergalactic Death Star powers capable of destroying state laws. For example, in a franchise dispute involving the 7/11 convenience store chain, the Supreme Court held in 1984 that the FAA applied in state courts and preempted a state law requiring a judicial forum for franchise disputes.[62] But the FAA was never

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[57] *Id.*

[58] Oral Argument at 4, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

[59] *DIRECTV*, 136 S. Ct. at 468.

[60] *Id.*

[61] *Id.* at 471.

[62] Southland Corp. v. Keating, 465 U.S. 1, 17 (1984).

intended to apply in state courts.[63] Similarly, over the years, the Supreme Court has held that the FAA preempted a state law banning arbitration of personal injury claims against nursing homes,[64] a state law imposing special notice requirements for arbitration clauses, [65] a state law banning the enforcement of pre-dispute arbitration agreements, [66] a state law banning arbitration of wage claims,[67] a state law banning class action waivers,[68] and a state law granting primary jurisdiction to an administrative agency to resolve disputes.[69]

Every prior FAA case, where the Supreme Court has found preemption exists, involved the FAA preemption of a state law. [70] However, in its *DIRECTV* decision, the Supreme Court goes much further and steps off the deep end. In *DIRECTV*, the Supreme Court holds that the FAA preempts the *parties' agreement*, as correctly interpreted by the state court under state contract law.[71] However, preemption of an agreement is an absurd result and violates the most fundamental principle of arbitration law: that arbitration law is a matter of agreement.[72] The power of the arbitrator, the legitimacy of the arbitrator's award, the constitutionality of the arbitration process, and all of arbitration law is based firmly (or was based firmly until *DIRECTV*) on the foundational principle that arbitration is a matter of agreement between the parties.[73] Like the Force in Star Wars, the agreement of the parties binds the galaxy of arbitration together.

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[63] *See generally* MACNEIL, *supra* note 4.

[64] Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012).

[65] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996).

[66] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995).

[67] Perry v. Thomas, 482 U.S. 483, 492 (1987).

[68] AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 351–52 (2011).

[69] Preston v. Ferrer, 552 U.S. 346, 362–63 (2008).

[70] *See supra* notes 61, 63–68 and accompanying text.

[71] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015).

[72] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."). *See also* H.R. REP. NO. 68–96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of [the FAA] is simply to make the contracting party live up to his agreement.").

[73] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement....") (citations and internal quotations omitted).

Pursuant to the Supreme Court's flawed FAA jurisprudence since the 1980s, the FAA can be expected to override a state law.[74] However, the FAA should not override the parties' agreement. The FAA should instead respect the parties' agreement. The majority treats the lower court's interpretation of the contract as correct and authoritative,[75] but nevertheless, the FAA trumps the agreement of the parties.[76] This flawed rationale can best be described as a "Jedi Mind Trick." Under the state court's authoritative and correct analysis interpreting the contractual terms, the parties agreed to incorporate state law, but at the same time, the majority, in effect, says the parties did not really agree to that state law because the FAA preempts this agreement and forces the parties to arbitrate.[77] This preemption of the parties' agreement turns arbitration law upside-down. After *DIRECTV*, nothing can stand in the way of FAA preemption, not a state law and (absurdly) not even the parties' agreement. As correctly pointed out by Justice Ginsburg in her dissent, the majority took a "dangerous first" step with its strange and unprecedented preemption analysis.[78]

Justice Ginsburg, in her strong dissent, recognized that FAA preemption is unusual and does not operate in the same way as traditional preemption.[79] For example, a federal labor law would easily preempt a conflicting state labor law.[80] However, "FAA preemption cannot occur without reference to a particular agreement of the parties."[81] In other words, all the Supreme Court's prior FAA preemption decisions cannot be disconnected from the particular arbitration agreements at issue in those cases. For example, in the Supreme Court's *Preston v. Ferrer* case, which is the high-water mark for FAA preemption because the Court held that the FAA preempts a state law granting primary jurisdiction to an administrative agency, it is critical to remember that the clause at issue was a broad arbitration clause where the parties bargained that all disputes between the parties would be resolved through arbitration.[82]

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[74] *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 17 (1984).

[75] *DIRECTV*, 136 S. Ct. at 468.

[76] *Id.* at 471.

[77] *Id. Compare* Obi-Wan Kenobi's Jedi Mind Trick ("these aren't the droids you're looking for"), STAR WARS: EPISODE IV – A NEW HOPE (20th Century Fox 1977), *with DIRECTV*, 136 S. Ct. at 471 (although the parties agreed to incorporate state law, as authoritatively interpreted by the state court, this is not the law the parties are looking for because of FAA preemption).

[78] *DIRECTV*, 136 S. Ct. at 473.

[79] *Id.* at 473 n.1.

[80] *Id.*

[81] *Id.* (quoting Brief for Law Professors as *Amicus Curiae*).

[82] Preston v. Ferrer, 552 U.S. 346, 361–63 (2008).

In *Preston*, Justice Ginsburg, who wrote the majority opinion, appropriately recognized the supremacy of the parties' agreement in arbitration law and in FAA preemption analysis. In *Preston*, the Supreme Court emphasized that the "dispositive issue" in the case is "*not* whether the FAA preempts [state law] wholesale" because in the abstract, the "FAA plainly has no such destructive aim or effect."[83] It is important to remember that the FAA does not preempt anything in the abstract on its own. There must be an agreement to arbitrate before FAA preemption could apply, and the scope of the parties' agreement could impact the preemption analysis. It was critical for the *Preston* Court to examine and acknowledge the parties' particular agreement at issue, which should be the foundation for all arbitration. The *Preston* Court found that where parties agree broadly to arbitrate all disputes between them, the FAA supersedes a state law requiring a dispute to be heard in an administrative agency.[84] The *Preston* Court appropriately recognized that FAA preemption cannot take place without consideration of the parties' agreement.

Suppose that the agreement between the artist and entertainment lawyer in *Preston* were rewritten to contain the following hypothetical terms:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state requires that such claims be heard in a judicial or administrative forum, this arbitration agreement is not enforceable.

It seems clear that if the artist's state required an administrative or judicial hearing for the dispute at issue in *Preston*, this hypothetical arbitration agreement would not be enforceable due to the bargained-for terms of the parties' agreement. In *Preston*, if the parties had agreed to incorporate such a state law requiring an administrative or judicial hearing, then the FAA would not have preempted the state law. The Supreme Court's FAA preemption cases must be analyzed together with the clauses at issue in those cases.

Consider a hypothetical twist to the Supreme Court's infamous *Southland v. Keating* case,[85] which is one of the biggest errors in the Court's history—but that's another story.[86] In *Southland*, the Court held that the FAA preempts a state law requiring courts to resolve franchising disputes.[87] However, it is

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[83] *Id.* at 353 (emphasis added).

[84] *Id.* at 349–50.

[85] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[86] *See generally* MACNEIL, *supra* note 4.

[87] *Southland*, 465 U.S. at 16.

critical to remember that the parties in *Southland* had bargained for a broad arbitration clause requiring all disputes to be arbitrated.[88] By bargaining for a clause broadly covering all disputes, the parties opted out of the state law requiring a judicial forum for franchise disputes. But suppose that the franchisor and franchisee in *Southland* had bargained for a different, narrower, hypothetical clause in their franchise agreement as follows:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state prohibits the arbitration of such claims between a franchisee and franchisor, this arbitration agreement is not enforceable.

With this narrower hypothetical clause, the *Southland* decision would have turned out differently. If a franchisee's state required courts or an administrative agency to resolve franchise disputes, and if there was a clause such as the hypothetical one above, then there would be no obligation to arbitrate.

Why would a national franchisor draft such an exclusion in their arbitration agreement? There are many reasons. Perhaps a state may have a better developed administrative government agency with its own specialized rules for resolving franchise disputes. In such states, the parties would forego arbitration to take advantage of the special government tribunals. However, in other states that do not have a specially designed administrative system for handling franchise disputes, the parties agree to arbitrate. It is not really important why the parties chose this exclusion.[89] What is important is that if

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[88] *Id.* at 4.

[89] There could be several other reasons why parties may bargain for application of state law in connection with an arbitration agreement. For example, state law may have special features not available through the FAA, and the ability to incorporate such features may make arbitration more attractive to parties. Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008) (although the FAA does not provide for expanded judicial review of awards, parties can agree to incorporate "state statutory or common law" permitting a completely different level of judicial review). Parties may also choose state law to govern arbitration clauses due to reputational concerns. For example, if a state has a strong policy favoring a judicial or administrative forum for consumer or employment claims, a company or employer may be willing to forgo arbitration in that state to promote a good reputation with employees or consumers in that state and to avoid the perception of undermining state policies. Also, a company or employer may willingly choose to submit to state policies to maintain a good reputation with state government officials or regulators, who may have the power to grant benefits in other matters. Concern about one's reputation

the parties bargained for such an exclusion, the FAA should respect this choice and party autonomy.

The Supreme Court's landmark ruling in *Concepcion* is known for its impact; the ruling in effect allows the elimination of class actions through the use of an arbitration clause.[90] Focusing on the legal issues in *Concepcion*, one sees that this impact or result of ruling is brought about through the doctrine of FAA preemption and the interplay between a particular contract, the FAA, and state law. In *Concepcion*, the Court held that the FAA preempts California's *Discover Bank* rule, which invalidated class action waivers.[91] However, it is critical to remember that the arbitration agreement in *Concepcion* was broadly drafted and covered all disputes between the parties.[92]

Suppose that the cellular telephone contract at issue in *Concepcion* were rewritten to contain the following hypothetical terms:

> Any claim arising out of this agreement shall be settled by arbitration. There shall be no right to any class or representative proceedings in arbitration (the "class waiver"). However, if the law of your state invalidates this class waiver, this arbitration agreement is not enforceable.

Similar to the above hypothetical twists to *Preston* and *Southland*, it seems clear that if the law of a customer's state invalidates judicial and arbitral class

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among members of the public and government officials due to the use of arbitration clauses is not far-fetched. For example, in 2014, General Mills suddenly reversed its adoption of an arbitration clause just a few days after its implementation because of strong criticisms from the public and government officials. *Sen. Menendez Urges FTC to Intervene on Behalf of General Mills Customers*, Apr. 17, 2014, http://www.menendez.senate.gov/news-and-events/press/sen-menendez-urges-ftc-to-intervene-on-behalf-of-general-mills-customers; Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES, Apr. 20, 2014, at A17. These are many possible reasons and benefits why parties may bargain for application of state law in connection with an arbitration agreement, but the reasons are not particularly important. If the parties agreed to incorporate state law in connection with arbitration, the FAA should respect the parties' agreement, the foundation of all arbitration.

[90] *See, e.g.*, Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (discussing the Supreme Court's decision on arbitration clauses is interpreted by lower courts and may harm employees and consumers).

[91] AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 352 (2011) ("California's *Discover Bank* rule is preempted by the FAA.").

[92] *Id.* at 336.

waivers, then the arbitration clause would be unenforceable for customers in that state, not because of the state law, but because the parties bargained for application of that law, even though the FAA may displace such a state law under a broad clause. *Concepcion* recognized that parties could agree to class arbitration, if they chose to do so, but the obligation to engage in class arbitration cannot be manufactured by law and instead must arise from the consent of the parties.[93] Thus, if the parties explicitly agree to class arbitration, or if the parties indirectly accomplish the same result through an agreement to incorporate a state law imposing class procedures, the FAA should respect the party's choice to engage in class arbitration.

In these above hypothetical twists to *Preston*, *Southland*, and *Concepcion*, if the FAA broadly preempted the parties' choice of state laws, such preemption would violate the cardinal principle of arbitration law—"arbitration is simply a matter of contract."[94] With these hypotheticals where parties limit their agreement by incorporating state law, it is important to remember that state law is not frustrating the purpose of the FAA in such situations; instead, the parties' agreement is limiting the obligation to arbitrate, just like the parties bargained for. Arbitration law is supposed to operate in a manner that respects the wishes of the parties.

It is critical to recognize that FAA preemption does not involve solely two factors, the FAA and state law, like other common preemption analyses.[95] Instead, FAA preemption analysis involves the interplay of three factors: state law, the FAA, and the particular agreement at issue between the parties, the foundation of all arbitration.

The Supreme Court in *DIRECTV* seems to have forgotten about the primacy of the agreement of the parties. The majority treats the lower court's interpretation of the contract as correct and authoritative, but nevertheless, the FAA preempts this agreement of the parties. After *DIRECTV*, nothing stands in the way of the FAA's intergalactic superpowers, not even the parties' agreement—the foundation of all arbitration. The Court's overriding of the parties' arbitration agreement crossed the Rubicon and entered "dangerous" territory.[96]

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[93] *Id.* at 348 ("[C]lass arbitration, *to the extent it is manufactured by* Discover Bank *rather than consensual*, is inconsistent with the FAA") (emphasis added).

[94] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

[95] *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (federal law preempted state law).

[96] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 473 (2015) (Ginsburg, J., dissenting, joined by Sotomayor, J.).

C. *Aiming Like a Stormtrooper: How* DIRECTV *'s Preemption Standard Misses the Mark*[97]

Another reason the *DIRECTV* decision is flawed is that the preemption standard used by the Court is unreasonable, has nothing to do with protecting the fundamental attributes of arbitration, and is inconsistent with the history of the FAA's enactment.

The Supreme Court in *DIRECTV* adopted an "equal footing" preemption analysis for interpretation of arbitration agreements. The Supreme Court reasoned that the FAA preempted the appellate court's interpretation because "California courts would not interpret contracts other than arbitration contracts *the same way*," and "nothing in the Court of Appeal's reasoning suggests that a California court would reach the *same interpretation* of 'law of your state' in any context other than arbitration."[98]

This equal footing preemption analysis from *DIRECTV* is very different from the FAA preemption analysis used by the Court in *Concepcion*, which involved a "fundamental attributes" preemption test.[99] In *Concepcion*, the state law at issue required the imposition of class procedures.[100] The Court in *Concepcion* held that the FAA preempted this state law because the forced imposition of class procedures interfered with fundamental attributes of arbitration.[101]

I am not a fan of the impact of *Concepcion*.[102] But at least *Concepcion*'s fundamental attributes test can be justified as focused on protecting the integrity and fundamental attributes of arbitration. In other words, *Concepcion*'s fundamental attributes preemption test is more tailored to arbitration. But requiring equal interpretations for all contracts does not really protect the fundamental attributes of arbitration in any way. Such a test merely

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[97] Especially in the original Star Wars trilogy, in virtually every battle involving stormtroopers, the stormtroopers are notorious for having marksmanship so poor it is comedic. Stormtroopers seem to always miss their mark. They wildly fire their weapons, but miss slow-moving targets just a few feet away.

[98] *DIRECTV*, 136 S. Ct. at 469 (emphasis added).

[99] *Concepcion*, 563 U.S. at 344 (2011) ("Requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

[100] *Id.*

[101] *Id.*

[102] *See generally* Imre S. Szalai, *More Than Class Action Killers: The Impact of* Concepcion *and* American Express *on Employment Arbitration*, 35 BERK. J. EMP. & LAB. L. 31 (2014) (observing that *Concepcion* threatens to have a destabilizing effect on the legal framework supporting individual arbitration proceedings in the United States).

ensures that we interpret language "in the same way" in different contexts.[103] But this goal of equal interpretation can be separated from arbitration; equal interpretation has nothing to do with the fundamental attributes of arbitration. Why is it necessary for equality with interpreting terms across the board in all types of contracts? For example, consider the phrase "reasonable time," which can appear in all types of contracts across a wide variety of industries.[104] Why does this phrase "reasonable time" have to be interpreted the same way in all types of contracts? The same phrase may mean different things in different settings across time, and there is nothing wrong with such diversity of meaning.

Also, requiring equality in interpretation of contract terms across all types of contracts is unreasonable because arbitration agreements have certain unique features that do not easily carry over into other contexts. For example, suppose an arbitration agreement contains an ambiguous phrase regarding the selection of an arbitrator. Language regarding the selection of an arbitration will not exist in other non-arbitration contexts, and thus searching for how courts interpret arbitrator-selection language in a non-arbitration context does not make much sense. An arbitration contract is not comparable to a shipping contract for the delivery of corn, or a residential lease, or a contract for gym membership. Arbitration contracts have unique features that may not readily appear in other settings, and thus the "equal interpretation" preemption standard is not reasonable.

In sum, *DIRECTV*'s preemption standard misses the mark in several ways. The standard is unreasonable and has nothing to do with protecting the fundamental attributes of arbitration.

D. *A Jar Jar Binksian Failure:* DIRECTV *'s Preemption Standard Has No Basis in the Text or History of the FAA*[105]

The equal interpretation preemption analysis also has no basis in the text or history of the FAA. The Court incorrectly framed the interpretation issue

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[103] *DIRECTV*, 136 S. Ct. at 469 (finding preemption of parties' contract because "California courts would not interpret contracts other than arbitration contracts *the same way*") (emphasis added).

[104] *See, e.g.*, GATX Logistics, Inc. v. Lowe's Cos., 548 S.E.2d 193 (N.C. Ct. App. 2001) (concluding that meaning of the phrase "reasonable time" in a warehousing agreement is a jury issue); Williams v. Coe, 417 So. 2d 426 (La. Ct. App. 1982) (construing the term "reasonable time" in a purchase agreement involving real estate).

[105] Jar Jar Binks, an alien who appeared in STAR WARS: EPISODE I – THE PHANTOM MENACE (20th Century Fox 1999), is generally regarded as a failure or low point in the *Star Wars* movies. He has been called the "the most reviled character in the *Star Wars*

as involving the savings clause of Section 2, but the savings clause does not deal with interpretation issues. At the very beginning of the opinion, where the Court frames the issue for the entire case, the Court quotes the savings clause of Section 2 of the FAA.[106] Although arbitration agreements are generally "valid, irrevocable, and enforceable" according to Section 2 of the FAA, the savings clause at the very end of Section 2 provides that arbitration agreements may be revoked for "such grounds as exist at law or in equity for the revocation of any contract."[107] The Court then summarizes its conclusion by stating that the lower court's "decision does not rest 'upon such grounds as exist...for the revocation of any contract,' and we consequently set that judgment aside."[108] At the end of the opinion, the Court concludes that "[t]he Court of Appeal's interpretation [of the contractual language] is pre-empted by the Federal Arbitration Act."[109] By framing the problem at the very beginning of its analysis as whether the savings clause is satisfied, the Supreme Court is concluding that the appellate court's interpretation fails to satisfy the savings clause. Unfortunately, the text of the savings clause does not justify the equal interpretation preemption standard.

The text of the savings clause of Section 2 of the FAA deals with defenses for the "revocation of any contract,"[110] not interpretation issues. The savings clause permits application of generally applicable contract law defenses, like fraud or duress, to revoke the entire contract. Under the savings clause, application of state law defenses will lead to two possible results: either the arbitration agreement is enforceable, or the arbitration agreement is revoked in its entirety because of a defense like fraud or duress. But the Supreme Court in *DIRECTV* is overly straining and trying to get more mileage out of the savings clause to go beyond the situation of revocation and instead address how one should interpret phrases within an arbitration agreement. The text of the savings clause only discusses grounds for the revocation of any contract; it was not drafted to micromanage the interpretation of particular terms within an arbitration contract. The savings clause does not provide interpretive guidelines or address how courts should interpret particular phrases within an arbitration agreement. By framing this case as involving the savings clause and holding that the lower court's interpretation fails to satisfy the savings

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saga," "symboliz[ing] what many fans see as the faults of the prequel trilogy," and "the most annoying film character of all time." Bruce Handy, *The Daring Genesis of J.J. Abrams's Star Wars: The Force Awakens*, VANITY FAIR, June, 2015.

[106] *DIRECTV*, 136 S. Ct. at 465–66.

[107] 9 U.S.C. § 2 (2016); *DIRECTV*, 136 S. Ct. at 465–66.

[108] *DIRECTV*, 136 S. Ct. at 466.

[109] *Id.* at 471.

[110] 9 U.S.C. § 2 (2016).

clause, the Supreme Court in *DIRECTV* is creatively amending the savings clause and in effect replacing the word "revocation" with "interpretation." Pursuant to the savings clause, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[111] However, after *DIRECTV*, the Court now seems to be saying that, under the savings clause, arbitration agreements are "valid, irrevocable, and enforceable, as long as courts apply such grounds as exist at law or in equity for the interpretation of any contract."

Just like the Court has been accustomed to doing for the last thirty or forty years, the Court in *DIRECTV* judicially amends the FAA and redrafts the savings clause by creating a demanding equal footing analysis with respect to the interpretation of phrases within an arbitration clause. Unfortunately, the FAA's text does not address how a judge should generally interpret phrases within an arbitration agreement. Interpretation of contract language is supposed to be addressed by state law, and according to the majority, the states are the "ultimate authority" in interpretation of contract language.[112] Here's the new Section 2.5 of the FAA, just recently created by the Court, which should be added to the text of the statute: "When a court interprets language within an arbitration clause, it must use the same interpretation it uses for non-arbitration contracts."

Also, requiring courts to interpret terms "the same way" in both arbitration and non-arbitration contracts does not fit well with the history of the FAA's enactment. The FAA statute was designed to remedy a very particular problem: before the 1920s, courts did not engage in specific performance of pre-dispute arbitration contracts.[113] As recognized by a House Report, the sole purpose of the FAA was to reverse the old law and make agreements enforceable, like any other contract: "Arbitration agreements are purely matters of contract, and the effect of [the FAA] is simply to make the contracting party live up to his agreement."[114] The focus of the FAA was simply on the enforceability of an arbitration contract, and the purpose of the statute was never to demand perfect equality in interpretation of particular phrases within all types of contracts. Of course, the FAA's enactment does embody a sense of equality, but equality in terms of enforcement of the agreement. This notion of equality under the FAA is a much broader, less heightened idea of equality in the sense that an arbitration agreement would now be enforceable, as opposed to not enforceable, like any other contract.

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[111] *Id.*

[112] *DIRECTV*, 136 S. Ct. at 468.

[113] *See generally* MACNEIL, *supra* note 4; IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

[114] H.R. Rep. No. 68–96, at 1 (1924).

However, the FAA's history does not support a more heightened interpretative standard of word-for-word equality when interpreting phrases within an arbitration clause and across the board in all types of contracts.

E. *Yoda: "Backwards and Hollow* DIRECTV*'s Preemption Standard Is. Guilty Until Proven Innocent You Are."*

Also, even assuming that the equal footing preemption standard is reasonable, protects the fundamental attributes of arbitration, and has some basis in the text and history of the FAA, there is another reason why the Supreme Court's majority decision is flawed. Under the majority's newly-created standard of equality of interpretation, courts cannot discriminate against arbitration when interpreting clauses. Like Yoda with his customary inversion of word order when he speaks, the majority reverses the normal order of proof here. What is the proof or evidence of discrimination accepted by the Court here? DidY you see the proof? The majority pulled another Jedi Mind Trick, and the proof of discrimination is—drum roll, please—nothing.

The proof of discrimination is a lack of proof of non-discrimination. In other words, as proof of discrimination, the Court points to a lack of proof of equal treatment. Repeatedly, the majority stressed that discrimination exists here because "neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid."[115] The majority determined the lower courts engaged in discrimination simply because there was no proof of lack of discrimination: "nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of 'law of your state' in any context other than arbitration."[116] Also, the majority stated "there is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of the words 'law of your state' in other contexts."[117] So, the Court adopts a preemption standard focusing on whether discrimination occurred, and the proof required to show discrimination is merely the lack of proof of non-discrimination.

The standard of equal interpretation equality is flawed to begin with in numerous ways as discussed above, but the standard becomes even more problematic when considering the proof accepted by the majority regarding this standard. In effect, the majority adopted a backwards guilty-until-proven-innocent standard. The standard adopted by the Court breeds mistrust and

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[115] *DIRECTV*, 136 S. Ct. at 469.

[116] *Id.*

[117] *Id.* at 470.

presumes discrimination until proven otherwise. Lower courts are presumed to be hostile and discriminatory against arbitration when interpreting arbitration phrases, unless the court can prove otherwise by demonstrating evidence that the court engages in the same interpretations in other, non-arbitration, contexts.

This standard can easily lead to a conclusion that a court's interpretation of an arbitration clause is discriminatory and hence preempted because equality in interpretation across different types of contracts is not likely to exist. Furthermore, as explained above, arbitration agreements may have special features or terms, like the selection of an arbitrator, that do not easily carry over into other contexts. *DIRECTV*'s preemption standard has no basis in the text or history of the FAA. This new standard, which is deeply flawed for many reasons to begin with, becomes even more problematic when one considers the hollow nature of proof used to examine whether the standard is satisfied—a lack of proof of equal treatment becomes proof that discrimination exists.

F. *Chewbacca: "Holy Sith! The Supreme Court Unbelievably Screwed Up a Key Citation!"*[118]

According to the majority, there is California authority holding that a contractual reference to state law should be interpreted in a dynamic manner to incorporate future changes in the law: "California case law itself clarifies any doubt about how to interpret the language. The California Supreme Court has held that under 'general contract principles,' references to California law incorporate the California Legislature's power to change the law retroactively."[119]

For this principle, the majority cites a 2013 California Supreme Court case, *Doe v. Harris*, which involves the interpretation of some language in a criminal plea agreement.[120] The *DIRECTV* majority claims that according to this California case, a reference in a contract to state law is dynamic, not-static, and incorporates future changes or amendments to the state law.[121] The majority misreads *Doe v. Harris*.

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[118] In Chewbacca's native language of Wookie, this section title would read: "Rrraarrwhhgwwr!!! Aawwwwh, Aarrragghuuhw, huuguughghg...wuuh!" Chewbacca's grunts and loud howls in Wookie more adequately capture the author's frustrations with the Supreme Court's flawed opinion than the English translation ever could.

[119] *DIRECTV*, 136 S. Ct. at 469.

[120] Doe v. Harris, 302 P.3d 598 (Cal. 2013).

[121] *DIRECTV*, 136 S. Ct. at 469.

Doe v. Harris involved a criminal defendant who entered into a plea agreement whereby he agreed to abide by a particular state law regarding registration as a sex offender.[122] At the time of signing the agreement in 1991, California's sex offender registration law required offenders to be fingerprinted and photographed, but the information provided by the offender would not become public record.[123] In 2004, California amended its sex offender law to make the sex offender's name, address, and photograph available to the public.[124] The criminal defendant then filed a civil complaint asserting that it would violate his plea agreement if the new version of the law applied to him.[125] Thus, an issue arose as to whether the criminal defendant had to abide by the state law as it existed at the time the contract was signed, or whether the criminal defendant had to abide by the newer, amended version of the state law.

The California Supreme Court held that the reference to the state law in the criminal plea agreement was not static and must be interpreted in a dynamic way to incorporate the new, amended version of the law.[126] The California Supreme Court reasoned that criminal plea agreements are "infused with a substantial public interest" and "subject to plenary control by the state," and as a result, a contractual reference to state law in this special context of a plea agreement must be interpreted dynamically for the public good.[127]

The California Supreme Court's decision in *Doe v. Harris* involved the special setting of criminal plea agreements, but the *DIRECTV* case does not involve a criminal plea agreement. The California Supreme Court in *Doe v. Harris*, however, did address commercial contracts and recognized that a different "specific policy" exists in the commercial setting.[128] In the commercial setting, static interpretations are preferred:

> The parties [in a commercial setting] are presumed to have had existing law in mind when they executed their agreement...; to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would

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[122] *Doe*, 302 P.3d at 600.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 603.
[127] *Id.* at 602, 603.
[128] *Id.* at 602.

> result in modifying it without their consent, and would promote uncertainty in commercial transactions.[129]

The majority in *DIRECTV* overlooks *Doe*'s critical distinction between a criminal plea agreement (where there is a public interest in giving a dynamic interpretation to state criminal law) and commercial agreements (where there is a strong interest in giving a static interpretation to avoid uncertainty in commercial transactions). *Doe v. Harris* demonstrates that different interpretive rules can apply in different settings, and this California case undermines the equal interpretation standard adopted by the majority requiring the same interpretation in all settings. The majority in *DIRECTV* claims there is no proof that California courts would interpret a contractual reference to an outdated law as an intent to follow the outdated law.[130] Yet *Doe*, the very case the majority inappropriately miscites, recognizes that static interpretations are appropriate in commercial contracts.

G. *The Force is Strong with These Three:* Mattel, Mastrobuono, *and* Volt

In holding that the FAA preempts a contract, as correctly and authoritatively interpreted by the state courts according to state law, the majority in *DIRECTV* forgets the primacy of the arbitration agreement in arbitration law. The majority also suggests it is nonsensical for anyone to agree to incorporate an invalid, preempted law.[131] However, the majority completely neglects to examine the reasoning of three earlier Supreme Court decisions which appropriately recognized the primacy of the parties' contract and the possibility of parties agreeing to be governed by preempted law: *Hall Street Assocs., L.L.C. v. Mattel*, Inc.,[132] *Mastrobuono v. Shearson Lehman Hutton,*

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[129] *Id.* at 602 (citation omitted).

[130] *DIRECTV*, 136 S. Ct. at 469 ("Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid.").

[131] *Id.*

[132] 552 U.S. 576, 590 (2008) (parties to an arbitration agreement "may contemplate enforcement under state statutory or common law").

Inc.,[133] and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*.[134]

About one month after its decision in *Preston v. Ferrer*, where the Court held that the FAA's intergalactic preemptive superpowers can displace a state's carefully-designed administrative scheme,[135] the Court appropriately acknowledged the critical role of state law in arbitration in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*[136] The FAA provides limited grounds for judicial vacatur or modification of arbitration awards,[137] and in *Mattel*, the Court addressed whether parties can draft arbitration agreements providing for enhanced judicial review of arbitral awards beyond the FAA's limited grounds for vacatur or modification.[138] The Court held that §§ 10 and 11 of the FAA provide the exclusive grounds for vacating or modifying an award under the FAA.[139] But the Court in *Mattel* was very careful to recognize the primacy of the parties' agreement. The Court explained that the FAA is not the only law governing arbitration.[140] The Court recognized that parties to an arbitration agreement, if they so desire, "may contemplate enforcement under state statutory or common law...."[141] Therefore, if state statutory or common law provides for judicial vacatur of arbitral awards on grounds differing from the FAA, and if parties bargained for application of such state law, the FAA would not preempt application of state law under these circumstances. But if parties did not agree to such state law, the FAA would control and prevent application of the conflicting state law.[142]

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[133] 514 U.S. 52, 59 (1995) ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt [a state law prohibiting arbitrators from hearing claims for punitive damages].") (emphasis added).

[134] 489 U.S. 468, 477 (1989) (the FAA does not preempt state law staying the enforcement of an arbitration clause "where, as here, the parties have agreed to arbitrate in accordance with California law").

[135] *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

[136] *Hall Street Assocs., L.L.C.*, 552 U.S. at 590.

[137] 9 U.S.C.A. §§ 10, 11 (West 2002).

[138] *Hall Street Assocs., L.L.C.*, 552 U.S. at 578.

[139] *Id.* at 584.

[140] *Id.* at 590.

[141] *Id.*

[142] *See, e.g.*, Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1168 (Ala. 2010) (in light of *Mattel*, parties may agree under state common law for de novo judicial review of arbitral awards, which is not allowed under the FAA); Cable Connection, Inc. v. DirecTV, Inc., 190 P.3d 586, 599 (Cal. 2008) ("[A] reading of the [California Arbitration Act] that permits the enforcement of agreements for merits review is fully consistent with the FAA 'policy guaranteeing the enforcement of private contractual arrangements.'") (*quoting* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court also appropriately recognized the critical, foundational role of the parties' agreement when addressing the relationship between the FAA and state law.[143] The state law at issue was New York's *Garrity* rule, which prohibited arbitration awards of punitive damages.[144] The Court in *Mastrobuono* explained the critical point, missed by the majority in *DIRECTV*, that the "FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties,"[145] the foundation of all arbitration. As succinctly stated by the Court in *Mastrobuono*, "*in the absence of contractual intent to the contrary*, the FAA would preempt the *Garrity* rule."[146] Thus, if parties bargained for state law to govern, state law would control even if the FAA would normally make that state law invalid through preemption. The majority opinion in *DIRECTV* pretends it is impossible or illogical for anyone to agree to abide by preempted law,[147] but the Supreme Court's prior FAA cases properly recognize that parties can agree to preempted law.

In *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, the Court addressed the FAA's preemption doctrine where the parties had bargained for state law to govern the arbitration agreement.[148] Just like in the *DIRECTV* case, a California appellate court in *Volt* had interpreted the parties' arbitration agreement to incorporate a state law.[149] This state law was in a direct, strong, irreconcilable conflict with the FAA. Pursuant to this state law, if pending litigation existed between a party to an arbitration agreement and a non-party, a court could stay arbitration so that the related litigation could

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(1985)); Hackett v. Milbank, Tweed, Hadley & McCloy, 654 N.E.2d 95, 100–01 (N.Y. 1995) (because the FAA's "overriding policy" is "the enforcement of arbitration agreements according to their terms," and because the parties explicitly chose state law to govern their arbitration clause, the FAA does not preempt vacatur of an award on state law grounds of irrationality and public policy, grounds not available under the FAA); *cf.* C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 419 (2001) ("By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act.").

[143] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995).

[144] *Id.* at 55 (*citing* Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976)).

[145] *Mastrobuono*, 514 U.S. at 57.

[146] *Id.* at 59 (emphasis added).

[147] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 469 (2015) ("Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid.").

[148] Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989).

[149] *Id.* at 472.

resolve common questions.[150] Also, pursuant to this state law, if pending litigation existed between a party to an arbitration agreement and a non-party, a court could go to a much further extreme and in effect *invalidate* an arbitration agreement by "refus[ing] to enforce the arbitration agreement" and directing all the parties to be joined in the pending litigation and to litigate in this one proceeding.[151] But the FAA does not directly provide for these options. Under the FAA, courts must compel arbitration when there is a valid arbitration agreement, even if related litigation is pending, and the FAA would not allow a court to refuse to enforce an arbitration agreement and order the parties to the agreement to litigate their dispute.[152] Thus, there was a severe conflict between the FAA and state law. In reconciling this extreme conflict, the Court in *Volt* held that the FAA would not preempt the state law because the terms of the parties' agreement, as interpreted by the state court, had incorporated that state law.[153] In holding that state law controlled pursuant to the bargained-for terms of the parties, the Court recognized the primacy of the agreement and emphasized the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms."[154]

Because of the primacy of the parties' agreement, the FAA's core objective should be respect for the choices of the parties and the enforcement of their bargained-for arbitration agreements as written. In light of these core principles, the FAA allows parties to bargain for application of state law as

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[150] *Id.* at 471 & n.3.

[151] *Id.* As quoted by the Supreme Court in *Volt*, the state law at issue, California Arbitration Act, Cal. Civ. Proc. Code Ann. § 1281.2(c) (1982), provides for the following: if a court determines that "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact . . . the court (1) may *refuse to enforce* the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." *Volt*, 489 U.S. at 471 n.3 (emphasis added).

[152] *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (the FAA "leaves no place for the exercise of discretion by a district court" and requires courts to enforce arbitration agreements, even if there is the possibility of inefficient, separate proceedings involving related claims).

[153] *Volt*, 489 U.S. at 477–79.

[154] *Id.* at 479; *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 65 (1995) (Thomas, J., dissenting) ("We concluded [in *Volt*] that even if the FAA pre-empted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be governed by the statute.").

part of their arbitration agreement, even if the FAA, absent party choice, would normally preempt the state law. The majority in *DIRECTV* neglected to acknowledge the Court's prior holdings in *Mattel*, *Mastrobuono*, and *Volt*, all of which respected the foundational rule of arbitration law and recognized the ability parties to adopt laws that would normally conflict with and be preempted by the FAA, and the majority pretended that no one would agree to be governed by invalid or preempted law.[155]

IV. TO THE DARK SIDE: THE PRACTICAL IMPACT OF THE SUPREME COURT'S FLAWED *DIRECTV* DECISION

The Court's decision, which is flawed on multiple levels, desecrates and overturns the most fundamental principle of arbitration law—that arbitration must be based on the agreement of the parties. The Court, engaging in a Jedi Mind Trick, overrides the intent of the parties, as correctly and authoritatively interpreted by the state courts. As recognized in dissent, the majority entered "dangerous" territory with this ruling by overriding the agreement of the parties.[156] Although not explicit in the dissent, there is a serious constitutional concern if a court overrides a parties' agreement and forces them to arbitrate pursuant to manufactured policies of the FAA. Judicial creation of an obligation to arbitrate on terms not agreed to by the parties would likely run afoul of the Seventh Amendment right to a jury.[157] The Court is continuing its fine tradition since the 1980s of grossly erroneous interpretations of the FAA. Like Anakin Skywalker's transformation into Darth Vader, the Court through *DIRECTV* has completed the FAA's transformation into a monster. Arbitration law, more than ever, is now on the Dark Side. Instead of turning arbitration law upside down, the Court in *DIRECTV* should have simply let the appellate court's decision stand and let DIRECTV live with the consequences of its own bad drafting.

As described above, *DIRECTV* sets forth an equal footing interpretation analysis for FAA preemption.[158] Any interpretation of a phrase within an arbitration agreement is subject to preemption if the same interpretation does

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[155] *DIRECTV*, 136 S. Ct. at 469 ("Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid.").

[156] *DIRECTV*, 136 S. Ct. at 473.

[157] *See, e.g.*, Riggs v. Scrivner, Inc., 927 F.2d 1146, 1148 (10th Cir. 1991) (compulsory, court-created obligation to engage in binding arbitration violates a plaintiff's constitutional right to a jury trial).

[158] *See supra* Section II.C.

not exist in the non-arbitration setting.[159] This equal interpretation analysis is the technical standard set forth in *DIRECTV*.

But putting aside the technical standard, here's the practical impact of *DIRECTV*. Recall that *DIRECTV* creates a twisted, backwards presumption of guilty until proven innocent.[160] A court is presumed to have engaged in a discriminatory and preempted interpretation of a phrase in an arbitration clause unless there is proof of interpreting the phrase "in the same way" in other contract settings.[161] Practically speaking, if there is an ambiguity in an arbitration clause, *DIRECTV*'s threat of preemption and guilty-until-proven-innocent standard will likely push courts to rule in favor of arbitration, to resolve all ambiguities in an arbitration clause in favor of arbitration. There is a risk of preemption and overruling by an appellate court if there is not enough evidence that similar interpretations exist within non-arbitration contracts. But as mentioned earlier,[162] arbitration terms will not easily be found in other contractual contexts, so there is likely to be little or no proof of equal treatment, which in turn is treated as proof of discrimination under this flawed *DIRECTV* decision. In sum, even though *DIRECTV*'s technical test is one of equal footing interpretations with a guilty-until-proven-innocent presumption, the practical effect of *DIRECTV* will be that judges will resolve all ambiguities within an arbitration agreement in favor of arbitration.

In the wake of its December 2015 *DIRECTV* decision, the Court in January 2016 GVR'd three related cases from the Hawaii Supreme Court in light of

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[159] The Supreme Court in *DIRECTV* reasoned that the FAA preempted the appellate court's interpretation because "California courts would not interpret contracts other than arbitration contracts *the same way*," and "nothing in the Court of Appeal's reasoning suggests that a California court would reach the *same interpretation* of 'law of your state' in any context other than arbitration." *DIRECTV*, 136 S. Ct. at 469 (emphasis added).

[160] *See supra* Section II.E.

[161] The majority repeatedly stressed that discrimination exists here because of the lack of proof of non-discrimination. *DIRECTV*, 136 S. Ct. at 469 ("neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid."); *id.* ("nothing in the Court of Appeal's reasoning suggests that a California court would reach the *same interpretation* of 'law of your state' in any context other than arbitration.") (emphasis added); *id.* (preemption occurs because "California courts would not interpret contracts other than arbitration contracts *the same way*") (emphasis added); *id.* at 470 ("there is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of the words 'law of your state' in other contexts.").

[162] *See supra* Section II.C.

DIRECTV.[163] "GVR" stands for *g*rant certiorari, *v*acate, and *r*emand.[164] If there is a pending petition for certiorari raising issues that are similar to issues decided by a recent case, the Supreme Court sometimes summarily GVR's the pending petitions for reconsideration in light of the new precedent.[165] In effect, through the three GVRs issued in the wake of *DIRECTV*, the Supreme Court granted certiorari in these Hawaii Supreme Court cases, vacated the judgments, and remanded the cases to the Hawaii Supreme Court so that the court could reconsider its prior rulings in light of the new equal footing preemption standard set forth in *DIRECTV*. Through the GVRs, it appears that the Supreme Court is signaling to the Hawaii Supreme Court that the FAA preempts the Hawaii Supreme Court's interpretations of the arbitration clauses at issue in these cases.

An illustrative Hawaii case involved financial disputes regarding luxury condos between the developer and purchasers of these condos.[166] The transaction involved several documents, including purchase agreements that did not have an arbitration clause and instead had a forum selection clause requiring litigation in a certain Hawaiian district.[167] In the declaration of the condominium association, which was another document referenced in the purchase agreements, there was an arbitration clause.[168] The Hawaii Supreme Court found there was no obligation to arbitrate.[169] The court interpreted the conflicting documents as containing an ambiguity regarding dispute resolution, and hence there was no clear intent to submit disputes to arbitration.[170]

The Supreme Court's GVRs in connection with the Hawaii cases strongly suggest that, although the Hawaii Supreme Court may have correctly and authoritatively interpreted the contract terms under Hawaiian law, the FAA preempts the Hawaii Supreme Court's authoritative interpretation of the contract. The Hawaii Supreme Court interpreted the documents as involving an ambiguity because of conflicting dispute resolution provisions. The GVRs

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[163] Ritz-Carlton Dev. Co. v. Narayan, 136 S. Ct. 800 (2016); Ritz-Carlton Dev. Co. v. Nath, 136 S. Ct. 799 (2016); Ritz-Carlton Dev. Co. v. Narayan, 136 S. Ct. 799 (2016).

[164] *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – and an Alternative*, 107 MICH. L. REV. 711, 712 (2009).

[165] *Id.*

[166] Narayan v. Ritz-Carlton Dev. Co., 350 P.3d 995 (Haw. 2015).

[167] *Id.* at 1000.

[168] *Id.* at 999.

[169] *Id.* at 1003.

[170] *Id.* ("[W]e hold that the arbitration provision contained in the condominium declaration is unenforceable because the terms of the various condominium documents are ambiguous with respect to the Homeowners' intent to arbitrate.").

suggest that these ambiguities should have been interpreted in favor of an enforceable obligation to arbitrate. In other words, instead of finding an ambiguity, the Hawaii Supreme Court should have reconciled the two seemingly-conflicting dispute resolution provisions, perhaps by finding a binding obligation to arbitrate and construing the forum selection clause more narrowly. Under a narrow interpretation, the forum selection clause may only address where arbitration-related court proceedings, like motions to confirm or vacate arbitral awards, must occur.[171]

The *DIRECTV* GVRs suggest other hypotheticals where the FAA would preempt lower courts' interpretations. For example, in the employment context, sometimes an arbitration clause purporting to be binding appears in an employee handbook, which contains a seemingly conflicting disclaimer that the handbook is not an employment contract and creates no contractual obligations. In the past, some courts might have found that the ambiguity renders the arbitration clause unenforceable.[172] However, the practical effect of *DIRECTV* is that the FAA could easily preempt such an interpretation under state law, unless there is evidence that courts would interpret the language in the same way in non-arbitration settings.

Any time there is an ambiguity in the terms of an arbitration clause, there is a risk of preemption unless there is evidence that courts interpret the language in the same way in non-arbitration contracts. Consider an arbitration clause that generally incorporates the rules of an arbitration provider, like the American Arbitration Association, which generally grants arbitrators broad discretion to control and permit discovery in connection with an arbitration proceeding. Further suppose that the arbitration clause states the following: "Each party shall have the right to take the deposition of one fact witness."

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[171] On remand, the Hawaii Supreme Court will technically have to apply the equal footing preemption analysis and examine whether other courts would have engaged in the same interpretative analysis in other non-arbitration settings. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 469 (2015) (finding preemption because "nothing in the Court of Appeal's reasoning suggests that a California court would reach the *same interpretation* of 'law of your state' in any context other than arbitration.") (emphasis added). *DIRECTV*'s preemption standard uses a guilty-until-proven-innocent presumption, and the lack of proof of equal treatment in non-arbitration settings would give rise to a finding of discrimination and hence preemption. As explained above, *supra* Section II.C, requiring equality in interpretation of contractual terms between arbitration and non-arbitration contracts is unreasonable because arbitration agreements have certain unique features that do not easily carry over into other contexts.

[172] *See, e.g.*, Sparks v. Vista Del Mar Child & Family Servs., 145 Cal. Rep. 3d 318 (Cal. Ct. App. 2012); Salazar v. Citadel Commc'ns Corp., 90 P.3d 466 (N.M. 2004) (finding arbitration clause in employee handbook unenforceable because handbook included disclaimer that the handbook is not a contract).

There is a possible ambiguity here. Does this one deposition clause limit all discovery just to one witness, and thus this one deposition clause acts as a ban or ceiling on discovery and limits the arbitrator's authority? Or does the one deposition clause serve merely as a floor or guarantee that the parties will have *at least* one deposition, in addition to any other discovery within the arbitrator's discretion? A judge may interpret this one deposition clause to operate as a harsh ceiling—as a ban on discovery—and under such an interpretation, a court may find that the arbitration clause is substantively unconscionable and unenforceable.[173] However, the drafting party wishing to enforce the clause will argue that *DIRECTV*'s equal interpretation test preempts this interpretation. Why? Because we assume the court was guilty until proven innocent, and there is no similar interpretation of this language in the non-arbitration setting. In effect, ambiguities in interpreting any phrase within an arbitration agreement are now resolved in favor of arbitration.

In many situations, the practical impact of *DIRECTV*'s equal footing preemption standard, which will have the effect of resolving all ambiguities in interpretation of any phrase in an arbitration clause in favor of arbitration, will undercut the traditional contract law principle of *contra proferentem* that ambiguities should be resolved against the drafter.[174] If an employer or corporation drafts an arbitration clause in an employee or consumer contract and the clause has an ambiguous term, the ambiguity should be resolved against the drafter under traditional contract law principles. However, *DIRECTV*'s new preemption standard appears to reverse this principle by encouraging courts to resolve all ambiguities in favor of arbitration.

Considering the broader potential impact of *DIRECTV* and how it could encourage courts to resolve all ambiguities in favor of arbitration, *DIRECTV* contributes to increased judicial rubberstamping of arbitration agreements, which is a broader trend over the past years. With the Court's ruling in *American Express Co. v. Italian Colors Restaurant* that the effective vindication doctrine is mere dicta,[175] the Court's ruling in *Rent-A-Center, West, Inc. v. Jackson*, that delegation clauses are fully enforceable so that arbitrators can resolve all arguments about the enforceability of arbitration

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[173] *See, e.g.*, Reid v. Optumhealth Care Solutions, Inc., No. 3:12–cv–00747–ST, 2012 WL 6738542, at *8 (D. Or. Oct. 11, 2012) (holding that a two-day limit for fact witness depositions and one-day limit for expert witness depositions are substantively unconscionable in connection with an employment dispute); Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rep. 3d 471 (Cal. Ct. App. 2008); Hamrick v. Aqua Glass, Inc., No. 07-3089-CL, 2008 WL 2853992 (D. Or. Feb. 20, 2008).

[174] Restatement (Second) of Contracts § 206.

[175] American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310 (2013).

clauses,[176] the Court's ruling in *AT&T Mobility LLC v. Concepcion* that preempts state law defenses undermining the fundamental attributes of arbitration, [177] and now *DIRECTV*'s extremely flawed equal footing preemption standard, the Supreme Court has been insulating arbitration agreements from attack. The legal system is inching closer and closer to a model of pure judicial rubberstamping of arbitration agreements.

Why is judicial rubberstamping of arbitration clauses problematic? Some, but not all, of the stronger parties in the consumer and employee context are overreaching by drafting unfair procedures or terms in arbitration clauses, in an attempt to slant the odds in the stronger parties' favor. The combined effect of recent Supreme Court decisions like *DIRECTV* is that it is harder for courts to monitor, review, and strike down unfair arbitration procedures. The FAA was never intended or designed to cover the small disputes of consumers and employees.[178] The Supreme Court is making it harder to monitor arbitration clauses for fairness in situations where the stronger party can take advantage of the weaker party. With an arbitration contract between two sophisticated commercial parties to cover their contract disputes, I am comfortable with all the pro-arbitration presumptions and standards in the world. But with respect to consumers and employees, as demonstrated by the Consumer Financial Protection Bureau study from 2015, there is often little to no meaningful understanding of the significance of an arbitration clause.[179] Because of the widespread use of arbitration in consumer and employee contracts and the lack of meaningful consent in such settings, as well as the impact of arbitration clauses, which can completely shut someone out of the formal civil legal system with its constitutional protections, courts should be more protective of employees and consumers.

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[176] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 72 (2010). *See, e.g.*, Lloyd v. BRSI, LLC, No. CIV–15–964–M, 2016 WL 234861 (W.D. Okla. Jan. 19, 2016) (relying on *Rent-A-Center* to compel arbitration and to direct arbitrator to rule on any challenges to the enforcement of the arbitration clause).

[177] AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 341 (2011).

[178] *See generally* IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

[179] CFPB, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at 11 (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

VI. CONCLUSION: IN A GALAXY NOT TOO FAR AWAY?

In conclusion, the Supreme Court's decision in *DIRECTV* is deeply flawed and turns arbitration law upside down. I hope that more federal agencies, like the Consumer Financial Protection Bureau and the Federal Communications Commission, with their current initiatives to regulate arbitration clauses,[180] can follow the path of the Centers for Medicare & Medicaid Services and enact rules that are more protective of consumers,[181] and perhaps Congress may eventually step in to limit or regulate the broad use of arbitration in American society. The Court has completely gone to the Dark Side with its grossly erroneous interpretations of the FAA.

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[180] Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 24, 2016). *See* John Eggerton, *Mandatory Arbitration Clauses Not Prohibited in FCC Privacy Order*, BROADCASTING & CABLE, Oct. 27, 2016, http://www.broadcastingcable.com/news/washington/mandatory-arbitration-clauses-not-prohibited-fcc-privacy-order/160716 (the Federal Communications Commission is preparing to engage in rulemaking regarding arbitration).

[181] 42 CFR § 483.70 (2016) (banning pre-dispute arbitration agreements in nursing home contracts).